Editor's note: appeal filed, Civ. No. 90-0187-S-HLR (D. Idaho), motion to reopen case filed Oct. 25, 1994; case had been remanded to agency for further proceedings on April 13, 1990; aff'd, (sum. judg. Sept. 30, 1996)

M. L. INVESTMENT CO.
v.
BUREAU OF LAND MANAGEMENT

IBLA 92-102 Decided September 15, 1994

Appeal from a decision of Administrative Law Judge Ramon M. Child affirming a decision of the Boise District Manager, Bureau of Land Management, that adjusted grazing allotment boundaries. ID-01-90-1.

Affirmed.

1. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Apportionment of Federal Range

   A decision adjusting user boundaries within a Federal grazing allotment was properly affirmed upon a showing that BLM had consulted, cooperated, and coordinated the determination concerning areas of allotted use by the grazers concerned in conformity to Departmental regulation 43 CFR 4110.2-4.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, and William F. Schroeder, Esq., Vale, Oregon, for appellant; Robert S. Burr, Esq., Office of the Field Solicitor, Department of the Interior, Boise, Idaho, for the Bureau of Land Management; W. F. Ringert, Esq., Boise, Idaho, for intervenors John C. Urquidi, Harriet Urquidi, and Bruneau Cattle Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

M. L. Investment Company (Company) has appealed from an October 24, 1991, decision of Administrative Judge Ramon M. Child that affirmed a March 21, 1990, grazing decision by the Boise District Manager, Bureau of Land Management (BLM), dividing the Center Allotment into user areas. The decision restricted the Company to use of pastures 2, 3, 6, 7, 14, and 15 within the allotment; in implementing this decision, pastures 2, 3, and 14 were combined with an adjacent allotment, the M. L. Field, and the combined tract, designated the Table Butte Allotment, was set aside for exclusive use by the Company. The 1990 BLM decision recited but did not change the current active grazing preference of the Company for the area affected, and stated the inventoried animal unit months established for individual users by BLM soil vegetative inventory. The BLM decision found the division of the Center Allotment was initiated at the request of the Company and conformed to a proposal for individual use made by the Company that was agreed

to by other grazers affected by the proposal and approved by BLM. The Company timely appealed the Judge's decision.

On appeal, the Company challenges a principal finding by Judge Child that the Company proposed and secured an agreement by other affected grazers to the allocation of the Center Allotment that was made by BLM in 1990 (Statement of Reasons (SOR) at 3; Reply at 21-34). Contending that Judge Child erred when he approved the 1990 BLM decision, the Company argues there was no agreement to divide the allotment as was done by BLM, and that actions taken by the Company and other users of the Center Allotment prior to division do not support the conclusion reached by the Judge that there was an agreement to divide the allotment into areas of use to which all affected parties had subscribed (see SOR at 4-24; Reply at 10). It is suggested that the circumstances of discussions between the interested grazers and BLM may be characterized as concluding in a BLM counteroffer that effectively rejected the Company proposal (SOR at 7-8; Repy at 5, 16-22). Alternatively, it is submitted that the decision approved by Judge Child failed to conform to established standards for land planning (SOR at 3; Reply at 11-14), or to equitably apportion the allotment (SOR at 25-27; Reply at 35), and that the allotment as divided by BLM lacks enough forage to satisfy the Company's grazing preference (SOR at 27-33; Reply at 19, 34, 39). The Company concludes that the division agreement, if one existed, should be rescinded because it is inconsistent with good grazing practices and because it was not concluded with the formality required of such an agreement, not having been submitted for review by the grazing advisory board and one of the preference holders within the Center Allotment (SOR at 34-36; Reply at 11, 39). Except for the argument concerning an alleged failure to conform to land planning requirements, all these arguments were made to Judge Child and rejected by him.

[1] After summing up the evidence received at hearing in a decision which we adopt and attach hereto as Appendix A, Judge Child dealt with the arguments now reiterated by the Company on appeal; rejecting them for reasons stated in Appendix A, he found that the 1990 BLM decision was made in conformity to Departmental regulations implementing the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-316o (1988). See Appendix A. He concluded, on the record developed at hearing, that after consultation, cooperation, and coordination with concerned permittees in conformity to 43 CFR 4110.2-4, BLM correctly apportioned the Center Allotment. The Company has not pointed to any error in the facts as found or the law as stated by the Judge, although it seeks to characterize and interpret the facts differently in order to avoid the conclusions he reached. Repetition and recharacterization of previously rejected arguments, however, cannot support an appeal from a decision making an allotment of grazing lands; the burden to show error in such cases rests with the appellant, who must show that the record does not support the challenged findings by pointing out specific error in the findings appearing in the questioned decision. See BLM v. Wagon Wheel Ranch, Inc., 62 IBLA 55, 65-67 (1982), and cases cited. The Company has not carried this burden on appeal.

Concerning the planning issue, on March 10, 1992, the Company filed a BLM planning document entitled "Bruneau-Kuna Land Use Decisions Summary and Rangeland Program Summary" dated June 1983, and requested the Board of Land Appeals to take official notice of its contents. The Company claims the 1990 BLM decision upon which Judge Child's decision rests is inconsistent with policies announced in this planning document. It is argued that, had the 1983 Bruneau-Kuna plan been submitted to the Judge at hearing, he would not have ruled as he did. On the strength of this document, the Company asks that we take official notice of the 1983 planning document and reverse the decision here under review, or, in the alternative, that the pending appeal be remanded to the Hearings Division for further hearing concerning the effect of the 1983 planning document on this case. In reliance on the 1983 plan, the Company has raised an argument on appeal, noted above, that the planning document is inconsistent with action of the sort taken by BLM in this case. This argument is rejected because the requests to take official notice of the document or order another evidentiary hearing into the matter must be denied.

Quoting from James E. Briggs v. BLM, 99 IBLA 137, 142 (1987), counsel for BLM correctly points out that this offer of evidence may only be considered in order to decide whether to reopen the case for further hearing, provided that a valid reason is shown to explain why the offered evidence was not produced at the 1991 hearing. The Company has not suggested an explanation for the failure to produce the 1983 plan at the 1991 hearing, nor is any reason for not doing so apparent (except that the relevance of the 1983 planning document to this appeal is problematic, at best). The plan is a general planning document for use in planning rangeland activity in the vicinity of the Center Allotment, examination of which fails to reveal that it has an application to this case such as the Company suggests. Nonetheless, it is not now admissible as a document of which official notice can be taken, because there has been no showing that will excuse the failure to offer this document at the 1991 hearing. Accordingly, it may not now be received for the purposes urged by the Company, and arguments made in the expectation that tardy submission of this document may be excused are therefore rejected as without foundation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

APPENDIX A

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

October 24, 1991

M.L. INVESTMENT COMPANY	:	ID-01-90-1
	:	
Appellant	:	Appeal from the District
	:	Manager's final decision
	:	dated March 21, 1990,
	:	
Boise District, Idaho BUREAU OF LAND MANAGEMENT	:	
	:	
Respondent	:	
	:	
JOHN C. URQUIDI and HARRIET URQUIDI, and BRUNEAU CATTLE COMPANY	:	
	:	
Intervenors	:	

DECISION

Appearances: William Schroeder, Esq., Vale, Oregon, and W. Alan Schroeder, Esq., Boise, Idaho, forAppellant; Robert S. Burr, Esq., Office of the Solicitor, Boise, Idaho, for respondent; William F. Ringert, Esq., Boise, Idaho, for intervenors.

Before: Administrative Law Judge Child

Statement of the Case

This is an administrative review of a Final Decision of the Boise District Manager of the, Bureau of Land Management (BLM or respondent) dated March 21, 1990. Prior to the issuance of the Final Decision, appellant and intervenors held grazing preferences within what was formerly the "Center Allotment' - that were subject to no 'area of use' restrictions., The Final Decision adjusted allotment boundaries and divided the original large Center Allotment (hereinafter "Center Allotment") into numerous, newly created, smaller allotments. The grazing preference of appellant and each intervenor was then apportioned to the new, smaller

allotments with the effect of reducing the area within which each permittee was allowed to graze cattle and, in particular, restricting appellant's use of its preference to several smaller private allotments in accordance with an alleged range line agreement between the parties.

The matter came on regularly for hearing on April 23, 24, and 25, 1991, at Boise, Idaho. The parties were requested to file proposed findings of fact, proposed conclusions of law and briefs in support of their respective positions and have done so. The parties were further requested to and did file responses to the above described filings. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent they are not so consistent, they are rejected.

The Issues:

The issues to be here determined are:

A. Does the Final Decision err in its reliance upon an alleged agreement entered into by the preference holders in the Center Allotment and the BLM?

B. Does the Final Decision improperly make a disproportionate allocation of the grazing capacity within the former Center Allotment?

C. Does the Final Decision err in restricting appellant to the use of an area with insufficient forage to satisfy its preference?

Statement of the Facts

Prior to the Final Decision, appellant held grazing preferences of 2,853 animal unit months (AUM's) and 279 AUM's in the Center Allotment and the adjacent M.L, Field Allotment respectively, both of which are located in the Bruneau Resource Area within the Boise District of the BLM, Intervenors John C. Urquidi and Harriet Urquidi (Urquidis), intervenor Bruneau Cattle Company, and Owen Ranches also held grazing preferences in the Center Allotment in the amounts of 2,482, 1,170, and 156, respectively. Although no "area of use" restrictions were placed an these preferences in the Center Allotment, each permittee had customarily limited their use to certain pastures within the allotment, Appellant historically restricted its use of the Center Allotment to pastures 2, 3, 6, 7, 13, and 15. On an informal basis, appellant had exclusive use of all of these pastures except pasture 13, where appellant's use was made primarily in the area east of Highway 51. (Tr. 207-209, 605-606, 633) This portion of pasture 13 east of Highway 51

later became part of pasture 14 and is so referenced hereinafter.

The Final Decision was precipitated by the proposal of appellant's authorized-representative Mr. Blessinger, to create for appellant a private use area within pastures 2, 3, and 14 of the Center Allotment and the adjacent M.L. Field Allotment. (Tr. 206-208, 562-563, 669-670) By establishing a separate use area, appellant would be able to keep its livestock from mixing with the other permittees' livestock and institute a deferred rotation system in said pastures and the adjacent M.L. Field Allotment. (Tr. 206- 207, 562) Both Mr. Pellant, who, at that time, was the BLM's lead range conservationist in the Bruneau Resource Area, and Mr. Taylor the present lead range conservationist, thought the proposal was a good one because, among other things, it had the potential to improve the vegetation on all of these areas. (Tr. 208, 564)

Mr. Blessinger's request to look into this matter included an inquiry as to whether there was enough forage available in pastures 2. 3, and 14 to meet appellant's grazing preference. Mr. Pellant requested Mr. Taylor, who had previously worked on the range survey in this area, to look at the forage production and carrying capacity of said pastures and determine if they would meet the preference of appellant, (Tr. 206-207, 565) After reviewing the inventory information, as requested by Mr. Pellant, Mr. Taylor found that pasture 13 had 1,,198 AUM's on the area east of Highway 51 (later known as pasture 14) and 1,022 AUM's an the area west of Highway 51. (Tr. 212) At the time, Mr. Taylor did not look at the carrying capacity of pastures 2 and 3 or any of the other pastures since the primary interest was on the areas later designated as pastures 13 and 14. (Tr. 212)

This inventory information was presented at a meeting of the Center Allotment permittees on September 8, 1983, which was called to discuss the. proposed Wickahoney Pipeline and appellant's proposal for a private use area within the Center Allotment. (Tr. 221, 566) No decision regarding appellant's proposal was made at this meeting because the following issues needed to be resolved: First, because it was recognized that appellant would require a trail right to its summer range over pastures 13 and 8, a determination had to be made as to the appropriate dates and number of days for the trail right. (Tr. 567-568) Second, the parties had to address the Urquidils potential loss of exchange of use privileges associated with their lease of State lands located within the private use area proposed by Mr. Blessinger,(Tr. 568) Third,, the parties generally believed that a fence should be built alone Highway 51 (the

Center Highway Fence) to set off the proposed private use area, but that a viewing of the area was necessary to determine the exact location of the fence.

Consequently, an on-site meeting was scheduled and held on September 15, 1983. (Tr. 568-510) At the on-site meeting the parties agreed to the location of the Center Highway Fence, which deviated a little from the highway and was marked with a few flags. (Tr. 224) The parties also discussed the Urquidi State lease question, the trailing issue, and the question of who would pay for and who would maintain the fence. (Tr. 224-225)

After the on-site meeting there was another meeting on March 1. 1984, at the Boise District Office, to discuss the Wickahoney Pipeline and the Center Highway Fence that would create appellant's private use area. (Tr., 231, 570) At that meeting, each of the parties was represented, including appellant in the persons of Mr. Barinaga and Mr. Blessinger. (Tr, 571) Mr. Taylor of the BLM updated the group on the status of the fence and how it would be funded. (Tr. 571) Then, it was agreed that appellant would have a 7-day trail permit in the spring and a 2-day trail permit in the fall to cross portions of the Center Allotment (pastures 8 and 13) outside of their proposed private use area. (Tr, 231,, 574, 643, 670, 800) The remaining issue regarding the Urquidis' State lease was also addressed and Mr. Blessinger agreed to recommend to John Basabi, Mr. Blessinger's boss, that appellant would transfer 45 AUM's to the Urquidis as compensation for the surrender of their State lease. (Tr, 231, 574-575, 643, 670, 800) Mr. Pellant indicated at the meeting that upon the creation of this private use area any future increases in forage outside pasture 14 could not be claimed by appellant and that permittees outside pasture 1,4 could not make claim for any potential future forage increases therein. (Tr. 576, 669-670) Mr. Taylor and others recalled similar discussions that if private use areas were created, each permittee would benefit by any increases or suffer any decreases in forage within their own area of use. (Tr. 221, 319-320, 658, 669, 803) Mr. Pellant did not recall any further meetings of the parties to discuss this matter. (Tr. 576-577)

The construction of the Center Highway Fence was contingent upon the said transfer of 45 AUM's (Tr. 233) After Mr. Taylor heard back from Mr. Blessinger that appellant was agreeable to the transfer Mr. Taylor prepared the Grazing Application - Preference Summary and Transfer Form (Exhibit R-11) for the parties. (Tr. 233) This transfer document was prepared between the March 1. 1984, meeting and May 21, 1984, when the document signed by Mr. Basabi on behalf of appellant, was received at the Boise District

office. (Tr. 89-91, 234) Thereafter, on October 31, 1984, Mr. Basabi executed on behalf of Simplot Livestock Co., appellant's parent company, a lease of the state lands formerly leased by the Urquidis. (Ex. I-26)

After Mr. Taylor received the signed transfer application (Exhibit R-11) , he then began preparation of the environmental assessment (EA) that would cover the construction of the Center Highway Fence, (Tr. 235) Mr. Taylor prepared the documents concerning the EA and the Decision Record Rationale included in Exhibit R-12. (Tr. 237-239) After the EA was prepared the BLM prepared the Cooperative Agreement for building the fence, (Tr. 240) The Cooperative Agreement was then circulated to the permittees for their signatures. (Tr. 243) The EA was not sent around with the Cooperative Agreement, but there was nothing in the stipulations in the EA that had not been discussed in any of the meetings prior to the signing of the 'Cooperative Agreement. (Tr. 244) In the fall of 1984, the Cooperative Agreement was signed by Mr, Bachman,, appellant's authorized representative since the early part of 1984. (Tr. 41, 99) After return of the signed Cooperative Agreement, the Area Manager signed the agreement for the BLM and then sent the Cooperative Agreement along with the Decision Record Rationale and the EA to Mr. Bachman, who was responsible for contracting the construction of the fence. (Tr. 245, 248) The fence was completed on December 9, 1984.

In August 1987, appellant's representatives, Mr. Bachman and Mr. Basabi, indicated that they were disturbed by the draft proposed decision that recently had been sent to the Central Allotment users. The draft proposed decision embodied the foregoing discussions and events regarding the creation of a private use area for appellant. Appellant's representatives disagreed with the distribution of the potential forage and stated that mistakes had been made in the past in accepting the agreement as to their area of use. (Tr. 252-254) After Mr. Taylor relayed appellant's concerns to the Area Manager, it was concluded that the proposed decision would be issued without any changes from the draft. (Tr. 257)

After appellant protested the proposed decision, a protest meeting was held at the Boise District Office on November 12, 1987, during which all of users of the Center Allotment were involved in the discussions surrounding the proposed private use area for appellant, Mr. Bachman spoke to the group and charged that the BLM had never given appellant a full appreciation for the total amount of forage available in the Center Allotment and expressed his feeling that Mr. Blessinger and/or Dale Blanthorn, who were former representatives of appellant, had made an error in accepting the agreement to create the private use area. (Tr. 260)

At the hearing, Mr. Blessinger testified that it was appellant's idea to have a private use area within the Center Allotment, that "if the AUM's were to be there,, we would accept them there," and that Mr. Taylor told him that sufficient AUM's were-available in pastures 2, 3, and 14, (Tr. 722, 730-731) However, according to Mr. Blessinger, prior to the March 1, 1984, meeting, there had been no discussions concerning limiting the preference of appellant to any pasture in the Center Allotment. (Tr. 728) Mr. Blessinger recalled discussing with Mr. Taylor or Mr. Pellant appellant's desire for a private pasture within the Center Allotment, rather than a private allotment, (Tr. 733-734) Appellant thus claims that it wanted to use the proposed private use area to the exclusion of the other permittees, but if the area did not provide sufficient forage to satisfy appellant's preference in any given year, then appellant wished to retain the option of grazing elsewhere in the Center Allotment to satisfy its preference, (Tr, 735-736, 743-744)

However, at the March 1, 1984, meeting, Mr. Blessinger discovered that the other parties had been operating under the assumption that appellant's proposal was to create a private allotment to which appellant's use of its preference would be restricted. (Tr. 737) Nevertheless, Mr. Blessinger did not inform the other parties that appellant desired a private pasture, rather than a private allotment nor otherwise attempt to disabuse the other parties of this conception. He testified that he had to determine whether the private use area contained sufficient AUM's to meet appellant's preference and discuss the matter with Mr. Basabi before entering into a final agreement with the other parties. (Tr. 737-738, 747) Before he could do so, he left the employment of appellant in mid-March of 1984. (Tr. 738, 747)

Mr. Blessinger did acknowledge that appellant agreed to trade Mr. Urquidi 45 AUM's in exchange for the Urquidils State lease, (Tr. 728) He recalled the facts, as recited in the minutes of the March 1. 1984, meeting, that the parties reached a tentative agreement, that he said he would recommend this action to Mr. Basabi, and that the parties agreed to later formalize their agreement with a written range line agreement. (Tr. 728)

Thus, after numerous meetings and discussions between appellant the BLM, and the other permittees, several actions were taken to carry out appellant's proposal. First, with BLM approval, the Urquidis surrendered the lease of State lands located within the proposed private use area in exchange for 45 AUM's of appellant, Second? a Cooperative Agreement was executed by the parties which provided

for the construction of a fence along Highway 51 (the Center Highway Fence.) to separate appellant's proposed private use area from the areas to be used by the other permittees. Third, with valuable contributions of labor, material, and/or money from each of the parties, the 'Center Highway Fence was actually built. Appellant then restricted its use to pastures 2, 3, 6, 7, 14, and 15 to the exclusion of the other permittees from 1985 through 1988 (Tr. 69-72, 92-93, 251-252, 645)

The Final Decision formalized these arrangements by restricting appellants to their customary areas of use: pastures 2, 3, 6, 7, 14, and 15 of the Center Allotment, More specifically, pastures 2, 3, and 14 were combined with the M.L. Field Allotment into the new Table Butte Allotment, pastures 6 and 7 were combined into the new Wickahoney Allotment, and pasture 15 was converted into the new Louse Creek Allotment, All of these new allotments were designated to be used solely by appellant. The other permittees were similarly restricted to their customary areas of use through the division of the Center Allotment into new allotments.

As a basis for the Final Decision, the District Manager referred to the existence of an agreement between the parties regarding the establishment of a private use area for appellant which "was formalized with the construction of the Center Highway Pence and the signing of the associated cooperative agreement." The Final Decision also stated that the "combination of the M.L. Field Allotment with M.L. Investment Company's existing use areas in the Center Allotment . . . was a sound management action that developed as a result of consultation, coordination, and cooperation with M.L. Investment Company and other Center permittees."

Discussion

Implementation of the Taylor Grazing Act of 1934, as amended, is entrusted to the discretion of the Secretary of the Interior, United States v. Maher, 5 IBLA 209 (1972). Where a decision determining grazing privileges has been reached and issued in the exercise of administrative discretion, the appellant seeking relief therefrom bears the burden of proof that the decision was arbitrary, capricious, or clearly erroneous as a matter of law. A decision may be held to be arbitrary or capricious if it is not supportable on any rational basis or if it is shown that it does not substantially comply with the grazing regulations. See Fasselin v. Bureau of Land Management, 102 IBLA 9 (1988); Webster v. Bureau of Land Management, 97 IBLA 1 (1987), A BLM decision regarding range management will be sustained as an exercise of discretionary authority to manage grazing

lands where the record establishes a rational basis for that decision consistent with range management objectives, Hugh A. Tipton, 55 IBLA 68 (1982).

A.

Does the Final Decision err in its reliance upon an alleged agreement entered into by the preference holders in the Center Allotment and the BLM?

Appellant claims that the Final Decision must be set aside because it is based upon an agreement for allocation of areas of use which does not exist or is not enforceable against it, But the evidence does not support these claims. Moreover, even if no enforceable agreement existed the Final Decision is supported on the rational basis that the allocation of areas of use constituted prudent range management through consultation, coordination, and cooperation with the parties.

1.

An Implied-in-Fact Agreement Exists

Appellant cites Jolley v. Clay for the proposition that no agreement exists between the parties, because the BLM and intervenors have not met their burden of proving by clear and convincing evidence that the alleged agreement was "complete, definite, and certain in all its material terms 103 Idaho 171, 646 P.2d 413, 418 (1982) While this general legal principle applies to the agreement in question, see, W. Dalton La Rue Sr. and Juanita S, La Rue, d/b/a/ Winnemucca Range, Appellants; M.S. Land and Livestock Company Intervenor, 9 IBLA 208 (1973), appellant's contention that the BLM and intervenors did not meet the appropriate standard of proof cannot be sustained,

All of the material issues identified and left unresolved at the September 8, 1983, meeting were resolved at or before the March l, 1984, meeting. First, the parties agreed that appellant's trailing rights would be 7 days in the spring and 2 days in the fall. While it is true that the actual course and direction of appellant's trail use through pastures 13 and 8 was left undefined, as appellant contends, there is no evidence to suggest that this detail was a material term of the agreement. To the contrary the complete absence of any showing of discussion or concern regarding this item indicates. that it was immaterial. Second, it was contemplated that appellant would transfer 45 AUM's to the Urquidis in exchange for the State lease. Third, the exact location of the Center Highway Fence had been determined, The undisputed testimony and-exhibits show

that a "tentative agreement" was reached by the parties at the March 1, 1984, meeting, subject only to approval thereof by Mr. Basabi.

There is no real dispute that appellants transfer of 45 AUM's to the Urquidis in exchange for their surrender of the State lease, the signing of the Cooperative Agreement, and the subsequent construction of the Center Highway Fence all occurred after the March 1, 1984, meeting and were undertaken to create a private use area for appellant, The only reasonable interpretation of these events is that both Mr. Basabi and appellant manifested their assent to create a private use area for appellant in accordance with the terms of the agreement

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Appellant acknowledges that "tentative agreement" was breached at the meeting on March 1, 1984, but argues that Blessinger had a few "conditions":

> First, [Mr. Blessinger] wanted to be assured that sufficient grazing capacity was available within the area. TR 722, 7373. Second, Blessinger wanted to present the idea to John Basabi, Blessinger's supervisor (TR 721). and solicit his approval. TR 728, 737, 747; EX 17. Third, he understood and it was expected that a Range Line Agreement would be made to create the agreement, if made. TR 414, 4151 728, 729, 802; EX 17.

(Appellant's Opening Brief, p. 15).

Assuming that the alleged conditions were, in fact, conditions precedent to the formation of a contract, Mr. Basabi's execution of Exhibit R-11, evidencing the transfer of 45 AUM's from appellant to the Urquidis, satisfies the second condition, thus indicating acceptance of the agreement, and estops appellant from arguing that the first and third conditions were not satisfied. See generally, 28 Am Jur 2d Estoppel and Waiver §§ 35-57.,

> [Wlhere parties have entered into a tentative agreement . . . with the understanding that it will be reduced to writing..... they may afterward so act upon the agreement . * . as to estop themselves from urging that it was not reduced to writing . . . .

17 Am Jur 2d Contracts S 28. Mr. Basabi so acted upon and clearly manifested appellant's assent to the formerly tentative agreement by executing Exhibit R-11.

Further, as noted in 17 Am Jur 2d Contracts S 2O, "[c]onduct may be as effective as words in manifesting mutual assent to a contract . . ." Appellant's consummation of the transfer of the 45 AUM's to the Urquidis, lease of State land formerly held by the Urquidis, execution of the Cooperative Agreement, and participation in the construction of the Center Highway Fence gave rise, at the very least, to an implied-in-fact contract to create a private use area for appellant and indicated acceptance by Mr. Basabi, and certainly appellant, of the tentative agreement of the parties reached on March 1, 1984.

> An implied contract is one, the existence and terms of which are manifested by the conduct of the parties, with the request of one party, and performance by the other party often being inferred from the circumstances attending the performance. (Citations omitted).

Clements v. Jungert, 90 Idaho 143, 153f 408 P.2d 810 (1965).

However, appellant repeatedly asserts that it cannot be implied from the aforementioned events that appellant or the other parties intended to create a private allotment, i.e., an area to which appellant's use of its preference would be restricted. The essence of the dispute, then, is whether the parties intended that the private use area would constitute a private allotment or that the private use area would constitute a private pastures i.e., an area to be used exclusively by appellant, but with no "area of use" restrictions imposed on appellant's preference.

Appellant argues that it never was provided with a copy of the Decision Record/Rationale EA or the EA prior to signing the Cooperative Agreement and that, in any event, said documents cannot be interpreted as informing appellant that a private allotment, as opposed to a private pasture, was contemplated. Also, the testimony of Mr. Basabi and Mr. Bachman was to the effect that they did not intend that the private use area would constitute a private allotment. (Tr. 753, 754, 766)

However, as noted in 17 Am Jur 2d Contracts SS 18-19:

> An objective test is generally to be applied . . . in determining whether the parties possess the necessary intention to contract. This means that the manifestation of a party's

> intention, rather than the actual or real intention, is ordinarily controlling, because a contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. . . .
>
> The meeting of minds which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed or manifested intentions, which may be wholly at variance with the former.

Based upon Mr. Blessinger's conduct at the March 1, 1984, meeting, a reasonable person would have understood appellant's subsequent conduct as affirming an intent to create a private allotment.

It is undisputed that Mr. Blessinger discovered at the March 1, 1984, meeting that the other parties contemplated the creation of a private allotment. He then failed to explain to them that he had been contemplating the creation of a private pasture. Instead, he merely stated that he would recommend that Mt. Basabi approve the tentative agreement. When Mr. Basabi manifested his approval by, among other things, agreeing to the transfer of the 45 AUM's to the Urquidis, the only reasonable conclusion to be drawn by the other parties was that appellant had agreed to the creation of a private allotment, as the other parties were not made aware of any contrary intention held by appellant's representatives.

The transfer of the 45 AUM's was the first step to be completed in carrying out the parties' agreement to create a private use area for appellant. Appellant then carried out the remaining steps, including entering into the Cooperative Agreement and contributing to the construction of the Center Highway Pence. By all objective manifestations of intent, the nature of the private use area was intended to be such that appellant's use of its Center Allotment preference would be restricted to that area as well as pastures 6, 7, and 15. The subjective intent of Mr. Bachman and Mr. Basabi differed from appellant's objective intent apparently because of poor internal communications between Mr. Blessinger, Mr. Barinaga, Mr. Bachman, and Mr. Basabi. (See Tr, 69, 84, 767-771) In general and in this case, the objective intent of the parties., as shown by clear and convincing evidence, must prevail over the undisclosed subjective intent of one of the parties to an agreement.

2.
Blessinger's Authority

Appellant argues that Mr. Blessinger had no authority to bind appellant to any such contract dividing or allocating the range in the Center Allotment. Appellant notes that Mr. Blessinger informed the other parties that the tentative agreement would have to be approved by Mr, Basabi. It was the subsequent conduct of Mr. Basabi, not the conduct of Mr, Blessinger, which bound appellant to the terms of the tentative agreement.

Mr. Blessinger may have failed to communicate to his superiors or replacement the fact that the other parties intended to create a private allotment and that Mr. Blessinger did not inform the other parties of appellant's undisclosed intention to the contrary. Appellant has cited no authority for the proposition that such behavior exempts appellant from the operation of the laws of agency. Mr. Blessinger, who was appellant's representative officially authorized to deal with the BLM and who had at least apparent authority to deal with the other parties, communicated in a manner that any reasonable person would have understood as importing a promise to create a private allotment, subject to Mr. Basabi's approval. That approval was given without qualification.

3.
Oral Nature of Agreement

Appellant suggests that the agreement is unenforceable because it was not in writing. However; because the verbal agreement did not involve a transfer of real property and was capable of performance within 1 year, the Statute of Frauds, Idaho Code Title 9, Chapter 5, does not require that the agreement be in writing signed by the parties. Even if the Statute of Frauds were applicable, partial performance of the oral contract is sufficient to take it out of the Statute of Frauds. Jolley v. Clay, 646 P.2d at 418-419 (satisfaction of the doctrine of part performance will entitle performing parties to specific performance), Here, the verbal agreement was partially reduced to -writing and performed in its entirety. (See Exhibits R-11 and A-5)

Moreover, the Interior Board of Land Appeals has recognized oral agreements for exchange-of-use where there was sufficient proof thereof (Briggs v. BLM, 99 IBLA 137, 147, fn.9, citing David Abel, 2 IBLA, 87, 95 (1971) and Lloyd Pewonka, 8 IBLA 303 (1972)), and there is no logical reason for treating this oral range line agreement differently. No statute of the United States or regulation of the Department of the Interior requires that any or all elements of an

agreement among permittees for allocation of areas of use be reduced to writing.

4.
Approval of Agreement

Appellant contends that the Final Decision should be set aside because the parties' agreement was never approved by the Advisory Grazing board, the BLM, or the Owen Ranch, one of the Center Allotment permittee so Appellant provides no support for this contention.

There is no statutory or regulatory requirement that the Advisory Grazing Board or the Owen Ranch approve the parties' agreement. While there is a BLM Manual provision requiring Grazing Board review of proposed adjustments to allotment boundaries,[1] the BLM Manual is not promulgated pursuant to the procedures required by 5 U.S.C. S 553 and thus does not have the force and effect of law. See United States v. Harvey, 659 F.2d--62 (5th Cir., 1981). There was no abuse of discretion in foregoing review by the Grazing Board, especially where all the Center Allotment permittees, with the exception of the Owen Ranch, participated extensively in the formulation of the agreement. Further, the Owen Ranch's nonparticipation in the agreement, at best, may be grounds for Owen Ranch to assert that it was not bound by the agreement. Appellant did participate in the agreement and is bound thereby.

The claim that the BLM did not approve the agreement is contrary to the facts. Both the Cooperative Agreement and Exhibit R-11, evidencing appellant's transfer of 45 AUM's to the Urquidis, were signed by BLM representatives. The issuance of the Final Decision further indicates that the BLM approved of the agreement. In fact, the decision specifically states "that an agreement was reached with all affected parties, including the BLM."

5.
The Adjustment of Allotment Boundaries was a
Proper Exercise of Authority

Even if the meetings among the BLM and the permittees had not produced the agreement,, the regulations permit the creation of the separate areas of use embodied in the Final Decision. The District Manager was authorized to "designate and adjust allotment boundaries" after "consultation,

[1] See infra note 3.

cooperation, and coordination with permittees." 43 CFR 4110.2-4. [2]

AS previously discussed appellant proposed and participated in numerous discussions leading up to the creation of the private use area through consultation, cooperation, and coordination with all the Center Allotment permittees, Later, the BLM circulated a draft proposed decision embodying the consensus of those discussions, although no law required it to do so. When differences of opinion surfaced regarding the draft, the BLM consulted with appellant. After the proposed decision was issued, the BLM called a meeting of the permittees to discuss appellant's continuing objections to the decision. In light of the foregoing, the BLM clearly consulted, cooperated, and coordinated with the Center Allotment permittees, including appellant, prior to adjusting the boundaries of allotments grazed by said permittees.

The adjustments in allotment boundaries, as noted in the Final Decision, constituted sound range management, The Table Butte Allotment was established to meet the general needs of appellant's livestock operation, as appellant itself represented those needs to the BLM, and enable appellant to institute a deferred rotation system that would improve the vegetation of the range. The Final Decision recognized the need "to separate [appellant's] livestock for herd management reasons such as differing breeds of bulls, breeding season, disease control, and livestock movement; . . . .and to separate [appellant's] use in the Center Allotment because of the different seasons of use associated with each permittee's operation, and the differing livestock and forage management needs that exist as a result." (Final Decision, p. 1; see also, Exhibit A-25., p. 2) All of these matters are relevant in addressing range management concerns and the needs of appellant's livestock operation. (Final Decision, p. 1) The Final Decision, in referring to the combination of the M.L. Field Allotment with appellant's existing use areas in the Center Allotment, recognized that historical use was being considered in the allocation of areas of use. The testimony showed that the area of use assigned to appellant by the Final Decision is the same area that appellant generally has used since 1962. Thus, even if there was no agreement between the parties, the Final Decision constitutes a proper exercise of the BLM's

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[2] Sec 4110.2-4 Allotments.
After consultation, cooperation, and coordination with permittees or lessees, the authorized officer may designate and adjust allotment boundaries.

authority to adjust allotment boundaries in furtherance of its duty to protect, manage, and improve the range.

After full consideration of each point raised by appellant on this issue, it is found that appellant has failed to meet its burden of showing that the BLM erred in the Final Decision in its reliance upon the agreement of the preference holders in the Center Allotment.

B.

Does the Final Decision improperly make a disproportionate allocation of the grazing capacity within the former Center Allotment?

The Final Decision Incorporates the Agreement of the Parties

Appellant asserts that the agreement and the Final Decision are not valid because they make a disproportionate allocation of the grazing capacity within the Center Allotment and establish a disproportionate "defacto" increase in preferences among some of the Center Allotment permittees. However, the Acting Assistant Secretary of the Department of the Interior has stated that the Department will, with certain exceptions, generally recognize range line agreements as effective between the parties, Specifically, he stated:

> Unless the public interest or the needs of governmental administration require modification of the boundary line or withdrawal of some or all of the lands from a particular permittee or licensee these range-line agreements are generally recognized by this Department as effective between the parties', unless it is clearly shown that force or coercion was used in effecting the range-line agreement, or that rescission of the contract is warranted, or that radical changes have occurred which merit a reconsideration of the range line, or the parties themselves agree on a modification. [Footnote omitted.]

James E. Briggs v. Bureau of Land Management 99 IBLA 137, 148 (1987) (quoting Wayne M. Whitehall, IGD 486 (1947)). In accordance with the general rule, the Final Decision properly recognizes the parties' agreement to be effective, and appellant failed to show that one of the limited

exceptions to the general rule should be applied in this case.

2.
The Final Decision Constitutes a Proper Exercise
of Discretion Even If There Were No Agreement

Appellant's claim that the Final Decision makes a disproportionate allocation of grazing capacity is unavailing. Appellant bases its argument, in part, upon the fact that, as of 1984, the BLM Manual 4111.32F and 4111.32F3 required that principles of equitable apportionment be applied in establishing allotments, Appellant claims that the BLM's failure to consider these provisions of the manual was an abuse of discretion.

It is clear that the BLM did not abuse its discretion by not addressing these manual provisions in rendering the Final Decision, The Final Decision was issued on March 21, 1990. Nearly 6 years prior thereto, on June 20, 1984, the aforementioned manual provisions were replaced by BLM Manual 4110-1.22D. The later provisions do not require or even mention equitable apportionment. [3]

Moreover, the regulatory definition of adjudication, which mentioned equitable apportionment and upon which the replaced manual provisions were based, was eliminated in July of 1978. See 43 FR 29067. Thereafter, the regulations make no mention of equitable apportionment. Instead, the grazing regulations have permitted the BUI to designate and adjust allotment boundaries after consultation, cooperation, and coordination since February 21, 1984. See 49 FR 6450, 43 CFR 4110.2-4.

The Department of the Interior has consistently sustained allocations of the Federal range which recognize the full

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[3] BLM Manual 4110.1,22D provides in pertinent part:

Designating New or Modified Allotments. New or modified allotments are designated after consultation, cooperation, and coordination as necessary to accomplish resource management objectives. . . .

Boundary Adjustments. The authorized officer may adjust allotment boundaries if, after consultation and coordination with affected interests and a review by the District Grazing Advisory Board, it is determined that boundary adjustments are necessary to correct management problems or promote proper use of the resources.

extent of the permittee's grazing preferences, but restrict the areas in which the permittee can exercise its preference rights, as a proper exercise of Departmental discretion where it is determined to be in the interest of sound range management. See, e.g., Ball Bros. Sheep Company et al., 2 IBLA 166, 169 (1971); Joyce Livestock Company, 2 IBLA 322, 327 (1971). The burden of proof is upon the appellant, as the one alleging that it has been wronged, to show by substantial and competent evidence wherein its rights have been impaired. Harold Babcock et al., A-30301, at 5 (1965), citing E.L. Cord dba EL Jiggs Ranch, 64 I.D. 232, 244 (1957). If appellant receives all of the grazing privileges to which it is entitled, it has n o right to demand any particular area of use or to complain about the grazing privileges granted to another permittee. Harold Babcock, at 5, citing Alice and L,A. Matter, IGD 296 (1942). and C.A. George, Verva Bowen, IGD 661 (1975).

As discussed in Part C of this Discussion, appellant has failed to show that its grazing-preferences have not been satisfied. Nor has appellant shown that the allocation of areas of use in the Final Decision seriously impairs its livestock operation, renders its private property valueless, or seriously endangers the possibility of its continuation in the livestock business. See National Livestock Company and Zack Cox, IGD 55 (1938); Ball Bros, Sheep Company, 2 IBLA at 70.

C.

Does the Final Decision err in restricting appellant to the use of an area with allegedly insufficient forage to satisfy its preference?

2.

The Final Decision Incorporates the Agreement of the Parties

Appellant argues that the Final Decision should be set aside because it restricts appellant within areas of use which do not support appellant's active preference of 2,853 AUM's in the Center Allotment. But, appellant concedes that no dispute exists regarding the adequacy of the forage in pastures 6, 7, and 15. Therefore, the 284 AUM's of appellant's preference assigned to said pastures are not actually in dispute, leaving 2,569 AUM's allegedly not satisfied by the forage available in the other pastures assigned to appellant: pastures 2, 3, and 14, (Appellant's Opening Brief, p. 27; Exhibit 4-) .

Like appellant's claim that the Final Decision made disproportionate allocations, this claim must fail because appellant has not shown any facts to justify deviating from

the rule that range-line agreements are generally recognized as effective between the parties, James E, Briggs, 99 IBLA at 148.

2.
The Final Decision Constitutes a Proper Exercise
of Discretion Even If the There Were No Agreement

Even if there were no agreement appellant's claim that its Preference was not satisfied cannot be sustained, Appellant claims that the forage in pastures 2, 3, and 14 is inadequate because (1) 405 AUM's in pasture 14 are committed to the Urquidis by a 1978 Agreement (Exhibit 16) and (2) these pastures do not contain 2,788 AUM's of grazing capacity as set forth in the Final Decision. The Final Decision confines the Urquidis' grazing use in the Center Allotment to pastures 1. 5, 8, or 10, 11, and 13, thus excluding the Urquidis from pasture 14, (Exhibit A-4) The effect of the Final Decision is to supersede Exhibit 16 and, if the Final Decision is affirmed, the Urquidis will be required to use the 405 AUM's of active preference in the areas assigned to them by the Final Decision.

Appellant's attack upon the BLM's grazing capacity figure is also fatally flawed. The BLM determined the grazing capacity of the areas of use assigned to appellant based upon the forage inventory conducted in 1979 and 1980 in accordance with accepted procedures and techniques, (Tr, 331-332, 460-461) Such a determination will not be disturbed in the absence of positive evidence of error. Ball Bros, Sheep Company et al., 2 IBLA 166, 169 (1971).

In attempting to show that the forage inventory figures were incorrect, appellant relied upon the testimony of Mr. Bachman and Mr. Schweigert. Mr. Bachman opined that said pastures did not contain 2,788 AUM's based upon his review of appellant's use reports and observance of the pastures. However, he failed to offer any alternative estimate or calculation of the number of AUM's available. More importantly, his opinion carries little weight because it was based upon unreliable data and nonstandard scientific procedures for determining forage inventory.

While appellant's use reports showed that appellant was using less than 50 percent of the forage purported by the BLM to be contained in pastures 2, 3, and 14, these reports were shown to be unreliable because appellant did not use the pastures effectively, Mr. Mitchell of the BLM conducted utilization studies in 1989, 1990, and 1991, which revealed that appellant generally restricted placement of salt and water for its cattle to relatively small areas located near roads rather than dispersing both the salt and water and

distancing the salt from the water. These practices resulted in very uneven use of appellant's grazing lands, with many key areas being left ungrazed. Mrs Mitchell concluded that representative utilization data could not be obtained due to such uneven use, but believed the pastures would meet appellant's preference if used more effectively, (Tr, 65-66, 515-527)

Mr. Schweigert's challenge to the BLM forage figures is also given limited weight because of a similarly inadequate basis. He relied upon a field study consisting of only one production clipping transect taken in 1990, BLM utilization studies from 1989 and 1990, and his limited observance of the large area. (Tr. 113-114, 128-133, 149, 193-194) His testimony is devoid of any statement that the method he employed was an accepted scientific method of determining the amount of forage or the carrying capacity of a large area of the Federal range.

Among other things, Mr. Schweigert's computations apparently did not take into account the effects of the extended drought that occurred within the Center Allotment and surrounding areas for several years prior to the time he made his transect. (Tr. 168) He acknowledged that soil, topography, weather conditions (both short term and long term), and over-use by livestock all should be taken into account in determining forage condition, yet, he did not state how he had taken those factors into account in arriving at his opinions regarding the accuracy of the BLM's forage inventory in the Center Allotment. (Tr, 186-187)

In contrast, the BLM took not one, but six production clipping transacts in conducting its own field study in 1990 in order to obtain results more representative of the entire area. (Tr, 462) While the BLM, like Mr. Schweigert, failed to consider precipitation effects of the procedures employed by the BLM in its 1990 field study are standard procedures employed as a matter of practice by the BLM in its range activities. The procedures followed constitute a scientific method for conducting a field study that had been approved by the BLM, (Tr. 460) Consequently, the BLM's field study, which generally confirmed the results of the 1979/1980 forage inventory, is entitled to greater weight than the study conducted by Mr. Schweigert. [4]

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[4] The 1979/1980 forage inventory showed 1,195 AUM'S, 749 AUM'S. and 844 AUM's for pastures 14, 3, and 2. respectively. The 1990 field study showed 1,195 AUM'S, 829 AUM'S, and 826 AUM's for the same pastures.

In reaching his conclusions, Mr. Schweigert also relied upon BLM utilization studies showing that pastures 2 and 3 contained 670 AUM's in 1989 and 281 AUM's in 1990. These amounts are substantially less than the 1979/1980 inventory figure of 1,593 AUM's for said pastures. However, Mr. Mitchell testified that the 1989 and 1990 utilization studies, like appellant's use studies, did not produce representative data due to appellant's uneven use of the area. As a result, Mr. Schweigert's conclusions based thereon are inherently unreliable.

The appellant has failed to sustain its' burden of showing that the forage inventory figures are in error. Appellant has also failed to take into account the additional AUM's inventoried in the M.L. Field Allotment. Pastures 2, 3, and 14 are combined with the M.L. Field Allotment into the new Table Butte Allotment by the Final Decision, Appellant's preference in the M.L. Field Allotment is 279 AUM'S, but the undisputed forage inventory figure for said area is 1,440 AUM'S. Therefore., the 1979/1980 forage inventory figures would have to be overstated by 1,370 AUM's to find that the forage is not sufficient to meet appellant's total preference assigned to the new Table Butte Allotment. Such evidence has not been produced.

Conclusion

Appellant has failed to sustain its burden. The Final Decision was rationally based upon an implied-in-fact agreement as well as a sound range management plan of action developed through consultation, coordination, and cooperation with appellant and the other permittees of the Center Allotment.

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

1. Factual findings stated elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

2. In 1983, Mr. Blessinger, the authorized representative of appellant, requested the BLM to establish a private use area for the appellant within the Center Allotment in order to separate appellant's livestock operation from other livestock operations and enable appellant to establish a

deferred rotation grazing system using portions of the Center Allotment and the M.L. Field Allotment. (Tr. 207-208)

3. At a meeting held on September 8, 1983, appellant's proposal for the establishment of a private use area within the Center Allotment was presented by appellant and the BLM to Bruneau Cattle Company and John and Harriet Urquidi (intervenors) who held the majority of the other active use preferences in the Center Allotment. (Tr. 214-216, 565-566)

4. On September 15, 1983, a second meeting was held during which the parties agreed to the location of the proposed Center Highway Fence. (Tr. 219, 222-224)

5. Subject to the approval of Mr. Blessinger's boss, Mr. Basabi, the parties reached an agreement regarding appellant's proposal for the creation of a private use area at a final meeting held on March 1, 1984, The agreement contemplated that appellant's use of the Center Allotment would be confined to pastures 2, 3, and 14, and what are now the Louse Creek and Wickahoney Allotments, with trailing rights across pastures 8 and 13 for 7 days in the spring and 2 days in the fall. Except for the trailing, appellant's use of the assigned pastures would be exclusive. (Exhibit A-25, pp. 2-3; Exhibit A-4, p. 2) The parties also agreed upon their relative responsibilities for construction and maintenance of the Center Highway Fence. (Tr. 232, 571) Finally, Mr. Blessinger agreed to recommend to John Basabi that appellant would transfer 45 AUM's to the Urquidis as compensation for the surrender of their lease of State lands located within the proposed private use area (Tr. 231, 574-575, 643, 670, 800)

6. Sometime between March 1, 1984, and May 21, 1984, Mr. Basabi executed the application transferring 45 AUM's of appellant's active use preference to the Urquidis. (Exhibit R-11; Tr, 89-91, 234)

7. On October 31, 1984, Mr. Basabi executed on behalf of Simplot Livestock Co., appellant's parent company, a lease of the State lands formerly leased by the Urquidis. (Exhibit I-26)

8. A Cooperative Agreement providing for construction of the Center Highway Fence was executed by the parties in the fall of 1984, (Exhibit A-5)

9. Under the direction of Mr. Bachman, appellant's authorized representative since spring of 1984, the Center Highway Fence was constructed and finished by December 9, 1984. Appellant then restricted its Center Allotment use to

trailing over pastures 8 and 13 and grazing pastures 6, 7, and 15 and the private use area, pastures 2, 3, and 14 from 1985 through 1988, (Tr. 69-72, 92-93, 248, 251-252, 645)

10. The parties entered into a valid range-line agreement for the establishment of a private use area for appellant in the former Center Allotment as specified in the Final Decision.

11. The BLM held discussions with appellant after issuance of the draft proposed decision and after the proposed decision. (Tr. 252-254, 257, 260)

12. The various operators in the Center Allotment run different breeds of cattle and all of the operators conduct breeding operations in the allotment at some time or another. Benefits can be derived from being able to control the breeding by separation of one operator's livestock from another's during the breeding period. (Tr. 608-610)

13. The creation of private allotments provides incentive to range users for construction of range improvements and for better herd management. (Tr. 622-623)

14 All of the operators grazing cattle in the Center Allotment prefer to keep their cattle separate for herd management reasons and because of the varying seasons of use. (Exhibit A-25, p. 2)

15. At all relevant times, appellant's preference assigned to the M.L. Field Allotment was 279 AUM's and to pastures 2, 3, and 14 of the Center Allotment was 2,569 AUM'S.

16. The grazing capacity of the area formerly known as pastures 2. 3. and 14 of the Center Allotment exceeds 2,569 AUM's.

17. The grazing capacity of the area formerly known as M.L. Field Allotment is 1,440 AUM'S.

18. The sufficiency of the forage in the areas formerly known as pastures 6, 7, and 15 of the Center Allotment is not disputed,

19. The Final Decision is reasonably and properly based upon (a) the parties' agreement and (b) the general needs of the Center Allotment permittee's ' livestock operations and proper range management principles and objectives, determined through consultation, cooperation, and coordination with the Center Allotment permittees.

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.

2. Conclusions of law reached and set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. The parties' agreement is binding upon appellant and precludes appellant from sustaining any claim in this proceeding that it is entitled to additional forage or preference in any portion of the former Center Allotment outside the areas of use assigned to the appellant by the Final Decision or that the forage is insufficient to satisfy its preference within its areas of use.

4. The Final Decision does not render valueless the appellant's privately owned land or seriously endanger the possibility of appellant's continuation in the livestock business, nor does it constitute a serious impairment of the appellant's livestock operation.

5. The areas of use assigned to the Appellant by the Final Decision contain adequate forage to satisfy appellant's active use preferences, and the appellant has no legal right to complain about the areas of use which were assigned to the intervenors.

6. The BLM followed the procedures required by the applicable statutes and regulations, including the requirement of 43 CFR 4110.2-4 that the BLM consult cooperate, and coordinate with appellant, in determining the areas of use and other features of the Final Decision.

7. There is no basis for modifying or reversing the Final Decision, which should be affirmed.

Order

The Final Decision of the District Manager dated March 21, 1990, is AFFIRMED.

Ramon M. Child
Administrative Law Judge